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IN THE

Supreme Court of the United States

SAMUEL H. TAKA & SILVIA A. TAKA d/b/a S. TAKA and ALBERT ISA d/b/a ALBERT ISA NURSERY,

Petitioners,

v.

E.I. DU PONT DE NEMOURS AND COMPANY, ALLEN TESHIMA, AND REGINALD HASEGAWA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners waived their "due process" claims by failing to present those arguments below?

2. Whether certiorari is appropriate to review an interpretation of state law by a state court of last resort?

3. Whether Petitioners waived their challenge to a state court's summary judgment ruling, which ruling was based on Petitioners' failure to present evidence, when Petitioners had notice of the grounds of the motion but chose not to present the evidence or seek a continuance to develop the evidence?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent E.I. du Pont de Nemours and Company ("DuPont") has no parent company, and no publicly-held company owns 10% or more of DuPont's stock. DuPont is a publicly-traded corporation listed on the New York Stock Exchange.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	11
I. PETITIONERS WAIVED THEIR FEDERAL DUE PROCESS CLAIMS BY FAILING TO PRESENT THEM TO THE COURTS BELOW	11
II. THE PETITION CHALLENGES A STATE COURT OF LAST RESORT'S CONSTRUCTION OF STATE LAW	12
III. PETITIONERS WAIVED THEIR OPPORTUNITY TO PRESENT EVIDENCE RELEVANT TO THE STATE TRIAL COURT'S SUMMARY JUDGMENT RULING	14
CONCLUSION	17

TABLE OF CITED AUTHORITIES

Page

Cases:

Ackermann v. U.S., 340 U.S. 193 (1950) 16

Adams v. Robertson, 520 U.S. 83 (1997) (*per curiam*) 12

Boston Edison Co. v. F.E.R.C., 885 F.2d 962 (1st Cir. 1989) 16

Celetox Corp. v. Catrett, 477 U.S. 317 (1986) ... 6

Chandler v. Florida, 449 U.S. 560 (1981) 14

Henry v. Mississippi, 379 U.S. 443 (1965) 14

Howell v. Mississippi, 543 U.S. 440 (2005) (*per curiam*) 12

International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380 (1986) 14

Market Street Railway Co. v. Railroad Commission, 324 U.S. 548 (1945) 15, 16

Matsuura v. DuPont, 330 F. Supp. 2d 1101 (D. Haw. 2004), *rev'd in part sub nom. Living Designs, Inc. v. DuPont*, 431 F.3d 353 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1281 (2006) 7, 8

Cited Authorities

	Page
Michigan v. Long, 463 U.S. 1032 (1983)	14
O'Brien v. Skinner, 414 U.S. 524 (1974)	14
Oregon v. Guzek, 546 U.S. 517 (2006)	14
State of California ex rel. Lockyer v. F.E.R.C., 329 F.3d 700 (9th Cir. 2003)	15
Urtz v. New York Central & Hudson River Railroad Co., 202 N.Y. 270, 95 N.E. 711 (1911)	1
Webb v. Webb, 451 U.S. 493 (1981)	12
Statute:	
28 U.S.C. § 1257(a)	11
Rules:	
Fed. R. Civ. P. 56	3, 8
Haw. R. Civ. P. 56	3, 8, 10
S. Ct. R. 14.1	3, 10, 11

INTRODUCTION

The petition raises no issue meriting review by this Court. Petitioners never presented their federal "due process" claims at any point in the proceedings below, and thus there is no "federal" ruling to be reviewed by this Court. To the contrary, the decision sought to be reviewed involves the application of state law by a state court of last resort, an improper subject of a petition for writ of certiorari. Moreover, as the decision below explained in painstaking detail, Petitioners waived their substantive claim – that additional evidence from their experts should have been considered in opposition to summary judgment – by failing to present the evidence, or to seek a continuance of the summary judgment hearing to develop the evidence, prior to the entry of judgment. For all of these reasons, the Petition should be denied.

STATEMENT OF THE CASE

1. On February 3, 2005, DuPont filed a "Motion for Summary Judgment Based on Plaintiffs' Inability to Prove Damages" in Petitioners' Hawaii state court action. DuPont's motion relied on the well-settled rule that the proper measure of damages in a "settlement fraud" case is the "fair" or "honest" value of the prior settlement in the absence of the alleged fraud. *See, e.g., Urtz v. New York Central & Hudson River Railroad Co.*, 202 N.Y. 270, 95 N.E. 711 (1911).

After the normal state court briefing cycle and a full oral argument on February 23, the trial court granted DuPont's motion by order dated February 28, finding as follows:

> [W]hen a Plaintiff claims to have been fraudulently induced to settle a tort claim because of discovery/ litigation fraud, (s)he has two options: (1) to sue to rescind the settlement contract; or (2) to affirm the contract and sue for fraud. If (s)he chooses to sue for fraud, the remedy available to Plaintiff is the fair compromise value of the claim at the time of the settlement. In order to meet their burden of proving the fair compromise value at the time of settlement, Plaintiffs would need to meet this burden with expert witness testimony directed to the numerous compromise factors, and how they would have applied to each Plaintiff's case. Plaintiffs have not submitted the expert testimony required to sustain their burden of proof on the proper measure of damages in this cases.

Pet. App. A124-A125. The trial court concluded, "Plaintiffs are therefore unable to prove the fact or amount of settlement fraud damages as a matter of law, and summary judgment is granted on all remaining claims herein." *Id.* at A125.

2. Petitioners appealed to the Hawaii Supreme Court, relying solely on direct attacks upon the trial court's reasoning. Notwithstanding their filing of a sixty-page opening brief and a thirteen-page reply brief,

Petitioners never suggested that the trial court's ruling on the speculative damages issue constituted a "due process" violation. Petitioners make no effort to show otherwise in their Petition, despite the clear mandate of Rule 14.1(g)(i).

3. On November 21, 2007, the Hawaii Supreme Court affirmed the state trial court's damages ruling. In an encyclopedic analysis of each prong of the trial court's order, the Supreme Court affirmed the court's reasoning as to (a) the choice of remedies available to an allegedly defrauded settling party; (b) the proper measure of damages for the alleged fraud; (c) the requirement for attorney expert testimony; and (d) Petitioners' failure to sustain their burden of proof. Pet. App. A19-A71. The court then provided an entirely separate analysis of Petitioners' "alternative argument" (which was not couched in "due process" terms) that they should have been given a second chance to present expert witness reports. *Id.* A72-A81.

Each aspect of the Court's decision was expressly limited to Hawaii state law. Federal authorities were cited only to the extent persuasive in ascertaining Hawaii state law (*e.g.*, decisions construing Fed. R. Civ. P. 56 were considered in interpreting Haw. R. Civ. P. 56).

a. The Supreme Court analyzed Petitioners' choice of remedies arguments, notwithstanding that they "provide[d] no discernable argument or cite[d] to any authority with respect to their position." Pet. App. A19. Acknowledging that several states reject any claim that "affirms" a settlement and seeks damages for fraud, the Court followed the "majority" of jurisdictions in holding

that a "settlement fraud" claimant has an election of either "(1) rescinding the contract, returning any benefits received, and being returned to the status quo or (2) affirming the contract, retaining the benefits, and seeking damages." *Id.* at A19-A28. In the case before it, Petitioners "unequivocally and knowledgeably" had elected to "affirm their settlement agreements and pursue an action for fraud."

b. Turning to the issue of damages, the Supreme Court agreed with the trial court that the proper measure of damages was "the fair compromise value of the claim at the time of the settlement." Pet. App. A29.

Again undertaking an exhaustive analysis of the cases, the Supreme Court concluded that, notwithstanding the differences among authorities as to certain aspects of the damages claim, the cases were "in accord" as to the "method of determining damages." Pet. App. A34-A41. This formulation requires determining the "fair" or "honest" settlement value in the absence of fraud:

> [H]ow much could the plaintiff have reasonably demanded and the defendant reasonably have allowed as a final compromise above and beyond the amount in fact allowed and received? In determining the amount, the jury would take into view the probabilities of the successful enforcement of the cause of action, the probable extent and expense of the expected litigation over this disputed claim, the law's delays, the probability of the continued solvency of the defendant, and such

> other facts pertinent to the question of damages as the evidence presented.

Pet. App. A39-A41 (internal alterations, quotation marks, and citations omitted).

The Supreme Court examined Petitioners' cases and found that all of the relevant authorities could be reconciled with this standard. Pet. App. A41-A45. Accordingly, Petitioners' attempt to seek to recover a different measure of damages – the "judgment value" of the settled cases – was unsupported and inconsistent with their election to "affirm" the settlements. *See id.* at A45-A47 ("[Petitioners] cannot have it both ways, *i.e.*, affirm an agreement not to sue for such product liability injuries and yet recover damages for those injuries. In other words, they cannot accept the settlement money, sign a release, affirm the release, and then sue for the *same* damages.") (emphasis in original).

c. Having concluded that the trial court properly applied the "fair compromise value" measure of damages, the Supreme Court turned to the need for attorney expert testimony. Surveying analogous areas of law ranging from medical and legal malpractice actions to prior Hawaii decisions analyzing settlements, the Court concluded that "the question whether DuPont's fraudulent misrepresentations caused damage to the plaintiffs in this case by preventing them from receiving the 'fair compromise value' of their claims is one on which the trier of fact must be guided by expert legal testimony." Pet. App. A57.

d. The Hawaii Supreme Court next scrutinized Petitioners' failure to present the required evidence, specifically examining each item of evidence presented by Petitioners. *See esp.* Pet. App. A60-A67.

The Supreme Court's discussion of the summary judgment standard confirmed that, as with Fed. R. Civ. P. 56, Haw. R. Civ. P. 56 requires that summary judgment be granted where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Pet. App. A58-59 (internal quotation marks omitted) (citing, *inter alia*, *Celetox Corp. v. Catrett*, 477 U.S. 317 (1986)).

Turning to Petitioners' evidence, the Supreme Court had little difficulty concluding that Petitioners had failed to produce sufficient evidence on the essential element of damages:

> [T]he plaintiffs' attorney experts merely presented conclusory opinions that would do little to assist a jury. Of crucial importance is the fact that none of the attorney experts provide any opinion testimony as to what specific settlement factors were or should be considered in settling each of the plaintiffs' underlying product liability cases and the evaluation of how those factors would have been altered had they known about the concealed evidence. . . . The experts did not explain how DuPont's conduct affected the plaintiffs' evaluation such that they would have settled for more, what each plaintiff claimed

> as his damages in the product liability cases at the time he settled and what he recovered, and how the settlement factors would apply to each plaintiff's case. It is not sufficient for an expert to simply state that he or she believed that, had the concealed evidence been known, the settlement value would have been greater because the existence of the concealed evidence strengthened the liability aspect of the litigation.

Pet. App. A67-A69. Accordingly, the Court affirmed the trial court's ruling that "unsubstantiated conclusions of the plaintiffs' experts are insufficient to raise a genuine issue of material fact that would preclude summary judgment." *Id.*

e. In the final substantive part of the Court's opinion, the majority addressed Petitioners' "alternative argument," the substance of which forms the basis of their newly-labeled "due process" claims in the Petition. A72-A81.

Although Petitioners were on notice of DuPont's "speculative damages" arguments much earlier,[1] the

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[1] On June 7, 2004, roughly eight months before DuPont presented its summary judgment motion in Petitioners' state court action, the United States District Court for the District of Hawaii granted summary judgment to DuPont in closely-related litigation based upon, among other grounds, the speculative nature of the "settlement fraud" claimants' damages. *See Matsuura v. DuPont*, 330 F. Supp. 2d 1101, 1121-25 (D. Haw. 2004). Although the Ninth Circuit reversed certain aspects of (Cont'd)

Hawaii Supreme Court assumed "that DuPont's theory of damages was either first raised, or only became clear, upon the filing of its motion for summary judgment." A73. Even with this assumption, however,

> [I]t can hardly be said, as the plaintiffs contend, that it was "not foreseeable" for the circuit court to conclude that the measure of damages would be the fair compromise value, especially in light of the arguments advanced by DuPont in its motion for summary judgment. . . . [T]his is not a case where the circuit court *sua sponte* rendered an outcome that could not have been expected by the parties.

Pet. App. A74-A75. In other words, given that DuPont expressly had urged the trial court to adopt the "fair compromise value" standard, Petitioners could not reasonably claim that the court's agreement with DuPont's stated position was wholly unexpected and "not foreseeable."

The Supreme Court further explained that the summary judgment rules themselves provided a mechanism of which the Petitioners could have availed themselves to develop the appropriate evidence, *i.e.*, a request for a continuance pursuant to Haw. R. Civ. P. 56(f). As with Fed. R. Civ. P. 56(f), this provision

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(Cont'd)
the district court's summary judgment ruling in December 2005, the Court of Appeals nevertheless endorsed the "fair settlement value" measure of damages. *Living Designs, Inc. v. DuPont*, 431 F.3d 353, 368 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1281 (2006).

authorizes the trial court to deny summary judgment or "order a continuance" to allow the non-moving party to develop needed evidence. Pet. App. A75. Plaintiffs, however, never sought such a continuance, but instead "continued to assert their contrary position on damages, disregarding DuPont's position and the fact that the circuit court might be persuaded to adopt DuPont's view of the measure of damages." Pet. App. A77.

Under these facts, the Supreme Court of Hawaii concluded that allowing Petitioners another chance to develop expert evidence would be fundamentally unfair:

> To permit the plaintiffs to now establish another record relating to the proof of damages, after unsuccessfully maintaining their position and failing to take advantage of the Rule 56(f) remedy available to them, would entitle them to two bites of the apple.

Pet. App. A79. Thus, the Court concluded that Petitioners had "waived their opportunity to secure further opinions from their experts to submit to the circuit court and cannot now raise it on appeal." *Id.* at A80.

f. Four of the five Hawaii justices concurred in the opinion by Chief Justice Moon, with Justice Acoba the lone dissenter.

Justice Acoba argued that, even if Petitioners were on notice of DuPont's damages position, they could not have known the trial court would accept that position until its order was entered. Pet. App. A94; *see also id.* at A95 n.3 (acknowledging that "Plaintiffs were put on

notice that Defendant advocated a different standard of damages when the motion for summary judgment was filed"). According to the dissent, Petitioners should have been allowed to limit their initial summary judgment response to disputing DuPont's damages theory and then, if DuPont's theory was accepted, given another opportunity to present evidence relevant to that theory. *See id.* A95-A96.

Justice Acoba also disagreed with the majority's construction of Haw. R. Civ. P. 56(f), again based on his reasoning that "there was no way to anticipate *before* the hearing was held that the court would adopt Defendant's standard of damages and apply it to Plaintiffs' expert testimony." Pet. App. A112 (emphasis in original).

3. Petitioners petitioned this Court for certiorari, devoting five pages of their Petition to quotations from Justice Acoba's dissenting opinion. As noted above, the Petition does not (and cannot) comply with Rule 14.1(g)(i), which requires Petitioners to specify

> "the stage in the proceedings, both in the court of first instance and in the appellate court, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and

> that this Court has jurisdiction to review the judgment on a writ of certiorari."

Petitioners do not cite any case holding that a state court's application of its own summary judgment procedures violates the constitutionally-mandated minimum due process requirements. Nor do Petitioners claim an actual lack of notice or opportunity to be heard. To the contrary, they expressly acknowledge that they received notice from and a pre-decision argument before the state trial court:

> There is no dispute that the Circuit Court provided Petitioners with formal process, and an actual hearing before it rendered its decision. . . .

Pet., at 28.

REASONS FOR DENYING THE PETITION

I. PETITIONERS WAIVED THEIR FEDERAL DUE PROCESS CLAIMS BY FAILING TO PRESENT THEM TO THE COURTS BELOW

Under 28 U.S.C. § 1257(a), this Court may review a state court decision where "any . . . right . . . is *specially set up or claimed* under the Constitution or the treaties or statutes of . . . the United States" (emphasis added). Rule 14.1(g)(i) implements this statute by requiring petitions for certiorari to specify in detail the circumstances in which the federal claim was presented to the state courts below.

In accordance with the statute, "this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (*per curiam*) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*)). Although it is "unsettled" whether the presentation requirement is "'jurisdictional or prudential,'" the Court repeatedly has refused to consider the issue where there is no showing that the narrow exceptions to the prudential requirement have been satisfied. *Id.* at 445-46.

In this case, Petitioners do not and cannot show that they presented their federal "due process" claims to the state courts, nor do they attempt to show circumstances that might warrant an exception to a "prudential" presentation rule. Under these facts, "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams*, 520 U.S. at 90 (quoting *Webb v. Webb*, 451 U.S. 493, 500 (1981)). For this reason alone, the Petition should be denied.

II. THE PETITION CHALLENGES A STATE COURT OF LAST RESORT'S CONSTRUCTION OF STATE LAW

Consistent with the statutory and prudential limitations on the Court's review of state court judgments, the Court has addressed the circumstances

under which it might review a state court decision on a writ of certiorari:

> [A] state court of last resort has decided ***an important federal question*** in a way that conflicts with the decision of another state of last resort or of a United States court of appeals; or
>
> [A] state court . . . has decided ***an important question of federal law*** that has not been, but should be, settled by this Court, or has decided ***an important federal question*** in a way that conflicts with relevant decisions of this Court.

R. 10(b)-(c) (emphasis added). Here, the Hawaii Supreme Court decided no "federal question" at all, because, among other reasons, Petitioners did not urge a federal question at any time.

The decision sought to be reviewed is a state court of last resort's definitive resolution of state law issues: the substantive "damages" law to be applied in a particular type of common-law fraud action, and the contours of the procedural law to be applied in adjudicating matters in the state court system. In the absence of a federal law-based challenge to the propriety of a state procedural rule itself (which would be waived, for the reasons set forth above), Petitioners' complaints amount to nothing more than a claim that the Hawaii

Supreme Court erred in construing Hawaii law. This is not an appropriate basis for certiorari.[2]

III. PETITIONERS WAIVED THEIR OPPORTUNITY TO PRESENT EVIDENCE RELEVANT TO THE STATE TRIAL COURT'S SUMMARY JUDGMENT RULING

In addition to Petitioners' waiver of the federal questions presented by their Petition, and even assuming this Court somehow could review the Hawaii Supreme Court's interpretation of Hawaii state law, Petitioners' claims still should be rejected under ordinary waiver principles.

This Court recognized long ago that, where a party has notice of the potential matters to be determined at a hearing and a chance to present evidence relevant to

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[2] *See, e.g., Oregon v. Guzek*, 546 U.S. 517, 521 (2006) (describing Court's jurisdiction to "review state-court determinations *that rest upon federal law*") (emphasis added); *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986) ("we have no authority to review state determinations of purely state law"); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (discussing policies underlying prohibition of review of decisions based on adequate and independent state law grounds); *Chandler v. Florida*, 449 U.S. 560, 570 (1981) ("This Court has no supervisory jurisdiction over state courts, and, in reviewing a state-court judgment, we are confined to evaluating it in relation to the Federal Constitution."); *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974) ("it is not our function to construe a state statute contrary to the construction given it by the highest court of a State"); *Henry v. Mississippi*, 379 U.S. 443, 447 (1965) ("we have no power to revise judgments on questions of state law").

those matters, that party cannot be relieved of its strategic decision to limit its arguments to less than the full array of possible issues. In *Market Street Railway Co. v. Railroad Commission*, 324 U.S. 548 (1945), for example, a railway claimed that it was denied a fair hearing in connection with a rate decrease because it did not understand the significance of certain matters that turned out to be determinative. Even accepting the railway's contention that "the decision and the grounds of decision were unexpected," this Court held that such "surprise is not necessarily want of due process":

> We find that the Company had reasonable notice that its rates were under attack and was not denied opportunity to be heard thereon. We can well understand how counsel's attention became diverted to more sharply contested aspects of the case. But even if a more convincing showing were made that the Company had relevant evidence to be heard, we find no adequate excuse for the failure to offer it at the proceeding. No offer was rejected, no request for time to obtain such evidence was denied. A misapprehension by a litigant of the steps which its best interest require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal for another chance, but it is not grounds for our interference as a denial of constitutional rights.

Id. at 558-59. *See also, e.g., State of California ex rel. Lockyer v. F.E.R.C.*, 329 F.3d 700, 712 & n.19 (9th Cir. 2003) ("Although the petitioners may wish they had

proffered more evidence or argued the merits more forcefully, they cannot claim they had no opportunity to do so.") (citing *Market Street*); *Boston Edison Co. v. F.E.R.C.*, 885 F.2d 962, 966 (1st Cir. 1989) (Breyer, J.) (rejecting claim of inadequate opportunity to be heard where issue had been identified in FERC's brief prior to decision and party was allowed to present petition for rehearing) (citing, *inter alia*, *Market Street*).

Here, Petitioners were notified of DuPont's damages position (at the latest) when DuPont filed its summary judgment motion. Rather than present evidence relevant to the "fair settlement value" damages standard urged by DuPont (or seek a continuance to develop additional expert witness reports addressing that standard), Petitioners elected instead to argue only that a different "judgment value" damages standard should be applied. Having made the calculated choice not to present evidence relevant to DuPont's asserted basis for summary judgment, Petitioners cannot now ask this Court to relieve it of its choice. *Cf. Ackermann v. U.S.*, 340 U.S. 193, 198 (1950) (holding that party could not seek relief from a prior judgment where he had elected not to appeal: "His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision . . . was probably wrong . . . There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.").

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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